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IN THE

SUPREME COURT OF THE UNITED STATES

October Term--1979

No 79-33

RAYMOND GOERES and ROBERT E. BIRCH,

Petitioners,

-vs-

JAPAN AIR LINES, LTD., a Foreign Corporation, INTERNATIONAL AIR SERVICES CO., LTD., a California Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE UNITED STATES

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This is an action for breach of contract and fraud brought by petitioners, airline pilots employed as captains of JAL[1] DC-8 aircraft. Their lawsuit is based upon the circumstances of their employment, and termination of that employment prior to expiration of the five year term of their contracts. Petitioners seek review of the lower court's pre-trial summary judgments for Respondents.

[1] Japan Air Lines, LTD. Respondents are designated "JAL" and "IASCO" herein, for purpose of brevity.

OPINION BELOW

The Memorandum opinion of the Ninth Circuit Court of Appeals is attached hereto as Appendix A. The opinion was not published and is so noted in 594 F.2d 242 (9th Cir. 1979). The order of the Ninth Circuit Court of Appeals, denying petitioners' Petition for Rehearing, is attached hereto as Appendix B.

JURISDICTION

The Memorandum opinion of the Ninth Circuit Court of Appeals was made on February 20, 1979. A timely Petition for Rehearing was denied by that Court on April 9, 1979 and this Petition for Certiorari is filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Supreme Court Rules, §19(1)(b).

QUESTIONS PRESENTED

1. Whether the determination of the question of agency by the District Court and the Court of Appeals, in this case, was in conflict with applicable State Law.

2. Whether the District Court's pre-trial summary judgments against the petitioners as to their breach of contract causes of action, and the Court of Appeals' decision affirming such judgments, were in conflict with applicable State Law.

3. Whether the District Court's pre-trial summary judgments against the petitioner's as to their fraud causes of action, and the Court of Appeals' decision affirming such judgments, were in conflict with applicable State Law.

4. Whether the District Court's summary judgments of this case constituted such a departure from the accepted and usual course of judicial proceedings, and the Court of Appeals decision so sanctioned that departure, so as to require the invocation of this court's powers of supervision and review.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution: (In applicable part):

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . "

Seventh Amendment to the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Tenth Amendment to the United States Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to

the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

I. Material Facts

The Memorandum opinion of the Ninth Circuit Court of Appeals generally reviews the case, but inaccurately states several of the more important facts at issue.

In 1968, petitioners were airline captains. They were qualified to pilot various types of passenger aircraft, but did not have DC-8 Captain certifications. Respondent, Japan Air Lines, Ltd., (JAL) had need for captains to operate its DC-8 aircraft. It obtained the petitioners, as trainees for DC-8 captain certification, from respondent International Air Service Co., Ltd., (IASCO) a California corporation in the business of supplying airline captains and flight crews to JAL and various other airlines.

Both of the petitioners left prior employment to enter into that training program, and each signed identical jet training contracts, to obtain, and pay for, certification as DC-8 captains. Upon completion of the training program, each petitioner signed identical written contracts of employment to serve as DC-8 captains for JAL, for a period of five years. The jet training contracts and the employment agreements were executed by petitioners and by

agents of IASCO. But all other matters involving the contracts were done and performed by or for JAL.

JAL selected all pilots for the DC-8 Jet Training program, from interviews with applicants in Tokyo.[2] JAL physicians gave pre-training physical examinations. JAL furnished the ground school and flight training to petitioners under the contract. JAL determined who passed or failed. After petitioners successfully completed the jet training program and signed their employment agreements, they were required to live in Tokyo, Japan. JAL assigned petitioners to particular flights, schedules and hours. Petitioners wore JAL uniforms and JAL insignias. Petitioners were subject to the authority of JAL agents, at all times, even during flights. And, as it developed, petitioners tenure was dependent upon the whim of JAL officials.[3]

Petitioners' employment agreements had an identical "escape clause" containing the following language:

> "If the contract between Employer and Operator is terminated for any reason beyond the control of Employer, or if Operator (JAL) notifies Employer (IASCO) that Operator needs fewer personnel for

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[2] The Court of Appeals found otherwise (Appendix A pg. A-1 last sentence) but JAL's authority in this respect is admitted by IASCO (CT 196)

[3] See pg. 8, this brief, and footnote 8 and 15.

the position to which Employee (each petitioner) is then assigned, this contract may be terminated, at the option of Employer, upon thirty (30) days written notice of Employee." (Parenthesis added)

On January 31, 1972, JAL sent its notice to IASCO that it had furloughed 15 DC-8 Captains, but did not mention any cutback of operations. And, although the Appellate Court determined that JAL informed IASCO that "it would no longer need 15 of the DC-8 captains that IASCO supplied,"[4] the letter to IASCO did not so state and JAL never advised IASCO that it needed "fewer DC-8 captains" supplied by IASCO, or otherwise[5]

Thereafter, IASCO sent each petitioner an identical letter, dated February 17, 1972, which stated in substance that IASCO had received notification from JAL stating that JAL required fewer DC-8 Captains than originally anticipated, and accordingly, each petitioner could accept furlough, "subject to recall", or termination of employment.

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[4] Appendix, pg. A-2, ln. 15-17; pg. A-4, ln. 4-6.

[5] The Letter read as follows: (CT 602)

"In accordance with JAL-IASCO Flight Crew Personnel Service Agreement, we hereby inform you of the manning reduction of ten (10) navigators and seventeen (17) flight engineers starting 1st of April, 1972.

Furthermore, fifteen (15) DC-8 captains and eight (8) navigators are furloughed from 1st of April, 1972 untill (sic) 31st of December, 1972. ..."

Neither petitioner accepted the "furlough" and petitioners' employment was therefore terminated, effective March 31, 1972. The "furlough" would have cost petitioners their wages for at least nine months, as well as loss of skills by inactivity, and there was no assurance of recall.[6]

JAL did not thereafter decrease its DC-8 Fleet nor its number of DC-8 Captains, but to the contrary. In the twelve months following the termination of the petitioner's employment, the number of JAL DC-8 Captains increased from 357 to 363. And JAL added another DC-8 aircraft to its Fleet in that year, increasing its total from 47 to 48.

Respondent IASCO first contended that Petitioners were placed on the "furlough" list because

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[6] IASCO's Letter provided as follows:

"IASCO has received notification from Japan Air Lines that commencing April 1, 1972 they require fewer DC-8 Captains than originally anticipated.

Consequently, IASCO has the right to terminate your employment . . .

JAL has indicated, however, that commencing approximately January 1, 1973 they will again experience an increased requirement for DC-8 Captains.

This being the case, IASCO wishes to give you the choice of:

1. Accepting this letter as notification of termination of your employment as of 2400 JST, March 31, 1972.

2. Agreeing to suspend your Employment Agreement together with all terms and conditions thereof and to go on "furlough" status subject to recall by IASCO on or about January 1, 1973..."

of incidents where each challenged the authority of JAL agents, stewarts, on flights in their command.[7] But JAL frankly admitted the reasons for the "furloughs". Petitioners were caucasians, GOERES a Canadian and BIRCH an Australian. JAL desired its flight personnel to be Japanese Nationals and, by April 1, 1972, could elevate 15 of it's Japanese 727 Captains to DC-8 Captains.[8]

At the time of termination, petitioner GOERES' Employment Agreement had 23-3/4 months remaining of it's five year term, and petitioner BIRCH's Employment Agreement had 27 months remaining of it's five year term. Both petitioners thereafter obtained employment as pilots for other airlines, for lesser remuneration. Each can show damages, loss of earnings, in excess of $38,000.00.

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[7] Both incidents involved ticket and seating arrangements for petitioners' respective wives.

[8] Keizo Sakai, a member of JAL's Planning Division, was to testify in his deposition, taken in Japan, for this case: "... it was JAL's policy of taking foreign crew members because there were not enough Japanese National crew members, . . . as Japanese Nationals became more available the foreign crew members would be phased out . . . we are always trying to fly with solely Japanese crew members, so . . . as soon as Japanese pilots become available, then there is a reduction in the number of foreign pilots, . . . In December of 1971, plans were made for 1972, . . . for a cut back of foreign crew members , as there was enough Japanese National crew members. . ." (Sakai Deposition pgs. 7, 8, 11, 24 and 25; taken January 28, 1976, Tokyo, Japan)

II. Basis for Federal Jurisdiction

Jurisdiction as to all causes of action of petitioner's Complaint is based upon diversity of citizenship, pursuant to 28 USC 1332. The Complaint sets forth that diversity and defines the citizenship of the several parties.[9] The case was filed in the United States District Court for the Central District of California, and thereafter transferred to the United States District Court for the Northern District of California. The review here sought is from the summary judgments entered in the latter court on August 9, 1976, and the Appellate Court's decision affirming those judgments.

REASONS FOR GRANTING THE WRIT

I

THE TRIAL AND APPELLATE COURT'S DETERMINATION OF THE QUESTION OF AGENCY WAS IN CONFLICT WITH ESTABLISHED CALIFORNIA LAW.

The relationship of the parties, and the status of the petitioners as employees and agents of the respondents, are the central issues of this case. The District Court did not define its grounds for summary judgment and filed no memorandum discussing the issues presented by the pleadings and motions under its

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[9] "Plaintiff Raymond Goeres is a citizen of the Country of Canada and plaintiff Robert B. Birch is a citizen of the Country of Australia. Defendant (IASCO) is a (California) corporation . . . (and)

consideration. The Court of Appeals found that there was "no control over IASCO by JAL"[10] and thus determine the absence of an agency between respondents. But never determined was the issue of agency or employment of petitioners by JAL, and the Memorandum of the Court of Appeals does not discuss the general and special agency created by the contracts and circumstances of this case.

California Statutes provide for that special relationship[11] and California case law has defined such an agency in a variety of circumstances.[12] But precisely in point to our case, is Martin v. Phillips Petroleum Co., (1975) 42 C.A.3d 916, a California precedent in point ignored by the Court of Appeals' decision. Martin v. Phillips Petroleum concerned a situation starkly similar to the circumstances of the case at bar. Martin, a laborer, was hired, and ostensibly worked for, a Plant Maintenance company, but performed all of his services for another company, Phillips Petroleum, at their premises. Here, as previously noted, petitioners

[9] Defendant JAL, LTD., is a foreign corporation (Complaint CT 3).

[10] Appendix, pg. 5, ln. 2.

[11] California Code of Civil Procedure § 2297, defines a special agent as "an agent for a particular act or transaction."

[12] Cignetti v. American Trust, (1956) 139 C.A.2d 744. (Loan collector); Capron v. State, (1966) 247 C.A.2d 212 (Arbitrator).

were ostensibly hired by IASCO, but performed all of their services for JAL. Martin attempted to bring a lawsuit against Phillips Petroleum, as a third party liable in negligence for an industrial injury. He contended that Phillips Petroleum was not his employer, or principal, because he was initially employed by the Plant Maintenance company. The Appellate Court rejected that contention and found Phillips Petroleum to be Martin's special employer with the Plant Maintenance company his general employer.[13]

The court, in Martin, supra, defined several criteria for such special and general employment, and the similarities between that case and this continues. There, as here, the employee was on the payroll of the general employer, (Plant Maintenance) who withheld his taxes and social security benefits. In our case, IASCO ostensibly paid petitioners but JAL furnished the money and signed the payroll checks. Martin worked for Phillips Petroleum without interruption for at least a year just as petitioners worked steadily for JAL for more than two years, "another indication of special employment." And in Martin, as here, all of the work tools and

[13] The court asked: "How can it be believed that work done by laborers shall be for Plant Maintenance's benefit, except of course for the fact that Plant Maintenance expects to be paid by Phillips? What other benefit does Plant Maintenance gain from work done at an oil refinery?" Martin, supra, at 919.

facilities were supplied by the special employer. The special employer in Martin, as in our case, laid out the work to be done and supervised the detail and quality of the tasks to be performed.[14] Finally, in Martin, supra, the right to terminate employment was discussed in determining the status of the special employer. There, Phillips Petroleum did not have the right to fire Plant Maintenance men directly, but, on their request, Plant Maintenance personnel would generally be terminated. Our case is even stronger as the evidence reveals that JAL had both general and special authority to terminate employees and a designated employee.[15]

There is some conflict in the evidence before the trial court as to the authority of JAL over IASCO--certainly sufficient to give rise to a triable issue of fact to be determined by a trial of the cause, rather than by the summary judgment procedure. JAL's control over IASCO, at least insofar as petitioners and other JAL captains were

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[14] The court there noted: ". . . the fact that the general employer has residual control, can recall the employee at will, and can discharge the employee or give him other orders is not the test for special employment, but rather, the right of the special employer to control the details of the work for which the employee was 'lent' . . ."

[15] On February 22, 1972, IASCO wrote to JAL concerning the pending "furlough": ". . . Captain Robert E. Birch will, with your approval, be included in the current furlough list..." (Emphasis added)

concerned, is underscored by the "furlough" letter of January 31, 1972. That letter stated: ". . . Furthermore, fifteen (15) DC-8 captains and eight (8) navigators are furloughed . . ." JAL did not ask or suggest, they told. And IASCO felt constrainded to submit for JAL's approval suggested additions to the "furlough list" (Footnote 15). From the language of that February 22, 1972 letter, it can be reasonably inferred that JAL compiled the "furlough" list, or at least, suggested candidates.[16]

But there is not even a conflict in the evidence as to JAL's authority and control over petitioners (pg. 5, supra, and footnote 15). JAL even admitted, in responses to discovery, that petitioners ". . . were under the supervision and authority of JAPAN AIR LINES officials for all operational matters only. . . ." The failure of the trial and Appeal Courts to acknowledge the general and special employment of petitioners by respondents constituted a denial of the fair application of the law of the State of California to this case.[17]

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[16] IASCO's chief pilot Sid Joiner told petitioner Goeres that JAL selected the 15 pilots to be furloughed. (Goeres Deposition, pg. 52, 63)

[17] The Court of Appeals cites Tieberg v. Unemployment Ins. (1970), App. Bd., 2d Cal.3d 943, 88 Cal. Rptr. 175, to the effect that the ". . . Right of control is one of the key determinates of an agency relationship. . . ." (Appendix, pg. 4) but did not apply that principal to the authority of JAL over the petitioners.

II

SUMMARY JUDGMENTS FOR RESPONDENTS ON THE BREACH ON CONTRACT CAUSES OF ACTION, AND THE APPELLATE DECISION AFFIRMING SUCH JUDGMENTS, ARE IN CONFLICT WITH CALIFORNIA LAW.

The resolution of the agency issue, as argued, would be decisive to the contract causes of action. With JAL as a special employer, and petitioners as special employees, the termination of the petitioners' employment prior to the expiration of their five year terms, would constitute an actionable breach of the employment agreements, in view of the admissions by JAL that they needed more, rather than fewer, DC-8 captains at the time they attempted to invoke the "escape clause." But under any resolution of the agency issue, the evidence before the trial court presents not only a viable case for breach of contract, but would warrant summary judgments for petitioners, rather than respondents.

The contract causes of action rest upon a careful reading of the escape clause and a just interpretation of its terms. To this interpretation the Court of Appeals brings an unfortunate misstatement of the wording of that clause. The opinion holds that: "The terms of the contract between appellants and IASCO were clear. If an operator needed fewer pilots from IASCO, then IASCO had the right to terminate the employees." The provision

in question did not so state. It provided, more accurately: "If operator notifies employer that operator needs fewer personnel for the position to which Employee is then assigned this contract may be terminated. . ." The difference is significant. JAL could need fewer pilots from IASCO but not need fewer personnel for the position (DC-8 captains) to which employee was (petitioners were) then assigned, precisely what occurred here, because JAL had promoted its Japanese National 727 pilots to DC-8 captains, thereby requiring fewer foreign pilots.

The only reasonable interpretation of the "escape clause", would require JAL to have a need for fewer DC-8 captains, before it could terminate petitioners' employment contracts.[18] And it is the need, not the notice of need, that is controlling. To permit respondents to invoke the "escape clause" on JAL's mere notice of need, would render the five year term of the employment agreements illusory, and such a construction should be avoided.[19]

Ironically, the letter from JAL to IASCO did not even say that JAL needed fewer pilots as required

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[18] "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." California Civil Code, Sec. 1643.

[19] Cox v. Hollywood Film Enterprises, (1952) 109 C.A.2d 320. Restatement of Contracts, 79.

by the "escape clause", but merely informed IASCO that 15 DC-8 captains were furloughed. IASCO then arbitrarily chose to present a hard alternative to petitioners, to either accept termination or put themselves on furlough, subject to recall on the first of the next year. Illusory language at best, and affording to petitioners no definite promise of future employment. This conduct alone should have required a finding of IASCO's breach of their contract, as a matter of law, or at least an issue to be submitted to a jury for determination.[20]

The opinion, as it stands, endorses the circumstances in this case to require one contracting party to be bound to the contract, but permits the others to arbitrarily terminate that contract, by their device of dividing the several indicia of a principal between two entities. This construction renders the Employment Agreements illusory and ignores the absence of mutuality of obligation thereby created.[21] The District Court and the Court of Appeals did not apply the applicable state statutes and precedent here cited and the summary judgments and opinion are against California Law.

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[20] See Baine v. Continental Assur. (1942) 21 C.2d 1

[21] Cox v. Hollywood Film, supra; Fabrro v. Dardi & Co., (1949) 93 Cal.App.2d 247

III

SUMMARY JUDGMENTS FOR RESPONDENTS ON THE BREACH ON FRAUD CAUSES OF ACTION, AND THE APPELLATE DECISION AFFIRMING SUCH JUDGMENTS, ARE IN CONFLICT IWTH CALIFORNIA LAW

The even admitted facts of this case, as elicited from the JAL officials deposed in Tokyo, was that JAL always harbored a secret intention to replace its foreign pilots with Japanese pilots as soon as they could be trained.[22] Concealment of such material facts, within the actual and special knowledge of respondents, has been everywhere determined to be actionable fraud.[23] Furthermore, petitioners paid in excess of $13,000.00 under the Jet Training Contracts, to obtain DC-8 captain's certification. They would not have quit their prior employment, paid respondents that fee for the training involved, and endured that training without the expectation of employment and employment tenure. The DC-8 Captains Certificates received for

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[22] Deposition of Nagano, pg. 10, ln. 1 to 25; Deposition of Sakai, pg. 29, lns. 1-18.

[23] "A deceit. . . is. . . (3) The supression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; . . ." California Civil Code Sec. 1710. Outboard Marine Corp. v. Superior Court, (1975) 52 Cal.App. 3d 30, 35, 124 Cal.Rptr. 852.

such training were valid only in Japan, and only JAL operated DC-8 aircraft of Japanese registry, at all times involved. Under these circumstances, the training was worthless when the petitioners' employment was terminated, and the consideration for the cost for such training paid by the petitioners substantially failed.

But petitioners' fraud case is not predicated soley upon fraud in the inducement. Also at issue is the deliberate and intentional conduct of the respondents to break their Employment Agreements with the petitioners. Such conduct constitutes actionable fraud,[24] and a breach of contract is a wrong, in itself actionable.[25]

The issue of fraud should have at least been left to the trier of facts and not determined by the Summary Judgment procedure of this case. Such determination ignores the precedent and authorities here cited and is in contravention of California Law.

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[24] "A promise to do something necessarily implies the intention to perform and where that intention is absent, there is an implied misrepresentation of fact which is actionable fraud. Kuffel v. Seaside Oil Co., (1970) 11 C.A.3d 354.

[25] Buxbom v. Smith, 23 C.2d 538

IV

SUMMARY JUDGMENTS OF THE DISTRICT COURT, AND THEIR SANCTION BY THE DECISION OF THE COURT OF APPEALS CONSTITUTED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, REQUIRING INVOCATION OF THIS COURT'S POWERS OF SUPERVISION AND REVIEW

The trial court granted summary judgment and dismissal of all causes of action of this case. That this drastic relief was not warranted has been previously discussed, in this brief. On the principal issues of agency, breach of contract, and fraud, substantial issues of fact and law were presented to the trial court. The opinion of the Court of Appeals seems to have weighed the evidence in a manner that affords the respondents the benefit of every reasonable inference in their favor. But, as the Ninth Circuit Court of Appeals has so consistently held in other cases, the evidence should have been otherwise considered:

> ". . . the party against whom a motion for summary judgment . . . is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact . . . neither the judge nor this court on appeal has the authority to weigh

credibility or to choose among legitimate inferences in such cases."[26]

1. Summary Judgment not Applicable to Question of Agency in this Case.

Questions of agency are mixed questions of fact and law, and not usually the subject of a summary judgment proceding. The trial court is the proper forum for the determination of the issues of agency and the court has broad discretion to determine the facts.[27]

Petitioners insist that they were hired by JAL, not IASCO, and always subject to JAL authority and control. Respondents' admit only operational control by JAL. Petitioners further contend that JAL had the unlimited right to discharge petitioners at will, a factor showing petitioners' employment by JAL,[28] even though their employment agreements appeared to provide for tenure. At issue, too, is the identity of the author of the "furlough list." All of the forgoing require a determination of the facts and circumstances of the petitioners' employment, and the conduct of each

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[26] Guam Federation of Teachers v. Ysrael, 9th Cir. 1974, 492 F.2d 438, cert. denies 419 U.S. 872, 95 S.Ct. 132, 42 L.ED.2d 111.

[27] George v. Chaplin, 99 C.A.2d 709

[28] Riskin v. I.A.C., 23 C.A.2d 248

respondent during the time of petitioners' services as DC 8 captains of JAL aircraft. Such questions of fact were not properly determined by the summary judgment procedings of this case and should have been reserved for resolution by jury or other trier of the facts.

2. Summary Judgment not Applicable to Breach of Contract Issue of this Case.

Under California Law, a party moving for summary judgment in an action on contract has the burden of establishing that the facts which entitle him to judgment are not disputed and that there is no legitimate issue of fact for determination for the trial court.[29] Here, respondents not only failed to meet that burden, but, by their own evidence, disclosed the dispute of the parties with respect to the "escape clause", and the occurence of the "condition subsequent" of that clause, prior to the termination of petitioners' employment. Such issues of fact should have been resolved by a trial of the cause, not by conflicting affidavits or other extraneous materials.[30]

3. Summary Judgment not Applicable to the Issue of Fraud of this Case.

In a fraud case, by California Law,[31] the

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[29] Fairbanks, et. al. v. Consolidated Fisheries, 190 F.2d 817 (1951)

[30] Aronson v. K. Arakelian, Inc., 154 F.2d 231 (1946)

[31] Bell v. Exxon Company, U.S.A., 575 F.2d 714 (1978); Bufalino v. Michigan Bell Tel., 404 F.2d 1023

party moving for summary judgment must clearly establish that there are no genuine issues of material fact. And the issue of fraudulent representations "fraud in the inducement" may not generally be resolved by the summary judgment procedure. (See Bell v. Exxon, supra, p. 21)

Thus, here, JAL's failure to reveal its policy to replace, or "phase out" its foreight pilots as soon as Japanese Nationals could be trained to replace them, respondents' deliberate breach of petitioners employment agreements and respondents' misrepresentations as to tenure, all raise question of facts for resolution by trail, not summary judgment.

CONCLUSION

The District Courts's summary judgments in this case, and the Court of Appeals' Memorandum Opinion, denied petitioners their right to a trail by jury and the due process of law guaranteed by the 5th and 7th Amendments of the Constitution of the United States.

Petitioners respectfully request that a writ of certiorari issue from this court to review the Court of Appeals' decision, and that this court reverse the decision and summary judgments of this case and remand the case to the trail court for trial.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX "A"

APPENDIX

MEMORANDUM

Raymond Goeres and Robert E. Birch, Appellants, v. Japan Air Lines, Ltd., etc., et al., Appellees. (USCA, 9th Cir., No. 76-3181, February 20, 1979).

BEFORE

TRASK and KENNEDY, Circuit Judges, and TURRENTINE,* District Judge.

MEMORANDUM

Summary judgment was entered against appellants on their breach of contract and fraud claims resulting in this appeal.

Appellants are commercial airline pilots who were employed by appellee International Air Service Co. (IASCO). IASCO is a California corporation that provides personnel to airlines. When an airline needs navigators, pilots, or other trained personnel, they can come to IASCO. The personnel remain employees of IASCO, flying for the company utilizing IASCO's services.

In 1968, Japan Air Lines (JAL), also an appellee, needed more DC-8 pilots. It went to IASCO to obtain the pilots. IASCO selected appellants as two of the pilots that would fly for IASCO under the contract between IASCO and JAL.

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*Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

Appellants were employed under a contract between themselves and IASCO. The contracts were to run for five years, but certain provisions were made for earlier termination. The one in question here reads in pertinent part:

> "If the contract between Employer and Operator is terminated for any reason beyond the control of Employer, or if Operator notifies Employer that Operator needs fewer personnel for the position to which Employee is then assigned this contract may be terminated, at the option of Employer, upon thirty (30) days written notice to Employee."

In January 1972, JAL wrote to IASCO informing IASCO that it would no longer need 15 of the DC-8 captains that IASCO supplied. Appellants were then informed that they could accept a lengthy furlough or be terminated. Appellants chose termination.

It is undisputed that in 1972 the number of DC-8 captains employed by JAL actually increased. JAL officials admitted that "foreign" pilots were only employed when there were not enough Japanese crews to man the DC-8's, so the "foreign" pilots were phased out.

Appellants claim a breach of contract. They assert that they could only be terminated on the occurrence of a condition subsequent. That condition was that the operator (JAL) need fewer personnel. Appellants also claim that fraud was involved in the inducement of the employment contracts with

IASCO.

After several trial delays, appellees filed motions for summary judgment. These motions were granted after a hearing.

Initially, appellants contend that the motions for summary judgment were improperly before the court because they had not been provided for in the pre-trial order. Under the Local Rules of the United States District Court for the Northern District of California, Rule 107(d), the final pre-trial order:

> "shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice. No further pre-trial motion, discovery, amendment or addition of parties may be made except as allowed or directed therein or by other pre-trial order of the court."

The language of the rule itself negates appellants' argument. The court can allow additional pre-trial orders if the occasion arises. In addition, Rule 56 of the Federal Rules of Civil Procedure allows a motion for summary judgment "at any time."

The success of appellants' contract claim depends on their ability to show that IASCO's acts can be imputed to JAL either through the showing of an agency relationship or some other theory. The factual setting of the case necessitates this.

IASCO employed appellants. The terms of the

contract between appellants and IASCO were clear. If an operator needed fewer pilots from IASCO, then IASCO had the right to terminate the employees. This is exactly what occurred here. IASCO was informed by JAL that it no longer needed 15 of IASCO's DC-8 captains. IASCO chose which captains to let go, and appellants were two of them.

Appellants' argument is that JAL actually needed more DC-8 captains, not less, so that the condition that could justify their dismissal had not occurred. The obvious problem is that appellants did not have a contract with JAL. Only if the terms of the IASCO-appellants employment contract can somehow be imputed to JAL is there any chance for appellants to prevail on a breach of contract theory.

First, appellants argue that the relationship between JAL and IASCO is one of agency. Right of control is one of the key determinates of an agency relationship. Tieberg v. Unemployment Ins. App. Bd., 2 Cal.3d 943, 88 Cal. Rptr. 175, 471 P.2d 974 (1970). In the present case, appellants have made no showing that JAL exercises any control over IASCO. IASCO hires and fires the pilots it uses, it decides which pilots to send to its various airline clients, it pays the pilots, and it settles pilot grievances.

Appellants point our that JAL did have some control over appellants while flying for JAL. For

example, JAL set schedules and made them wear JAL uniforms. But, this shows no control over IASCO by JAL. Under these circumstances IASCO was not the agent of JAL.

Appellants also assert an alter ego theory in an attempt to spread liability to JAL. The alter ego theory was developed from the practice of piercing the corporate veil in order to hold shareholders liable. See, e.g., Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825, 835-36, 26 Cal. Rptr. 806, 812-13 (1962). The alter ego theory is simply inapplicable here. There has been no showing that either IASCO or JAL have any ownership or financial interest in the other.

Since JAL cannot be held liable on an agency theory, appellants must look directly to their employer--IASCO. In the contract relationship between IASCO and appellants, the contract provision seems to be quite clear and unambiguous. IASCO was informed that its client--JAL--would need fewer of IASCO's pilots. Under those circumstances, IASCO could terminate the appellants. Since this is exactly what happened, appellants have no material issues of fact that would require going to trial.

Appellants also attack appellees on a theory of fraud in the inducement of the contracts. Appellants claim that IASCO and JAL knew from the beginning that the appellants would not be hired for the full term and that they would be laid off.

The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. 4 Witkin, Summary of California Law 2711 (8th ed. 1974). Appellants have failed to show any material issue in question on these elements. In the face of the clause giving IASCO the right to terminate the agreement if the operator requests fewer pilots, it is difficult to see how plaintiffs could have justifiably relied on any guarantees of future employment.

There being no material issues of fact to be decided, the district court's order granting summary judgment is AFFIRMED.

APPENDIX "B"

APPENDIX B

Order

Raymond Goeres and Robert E. Birch, Appellants, v. Japan Air Lines, Ltd., etc., et al., Appellees. (USCA, 9th Cir., No. 76-3181, April 9, 1979.)

BEFORE:

TRASK and KENNEDY, Circuit Judges, and TURRENTINE,* District Judge.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

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* Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

- PROOF OF SERVICE BY MAIL -

JACQUE BOYLE, declares and states:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 707 Wilshire Boulevard, Suite 4670, Los Angeles, California 90017. On July 7, 1979, I served the within Petition for a Writ of Certiorari to the Supreme Court of the United States on all parties involved in said action, by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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FOR THE NINTH CIRCUIT
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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 7, 1979 at Los Angeles, California.

Jacque Boyle

JACQUE BOYLE, Attorney for Appellants